Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **12 November 2021**

Public Authority: **Cherwell District Council**
Address: **Bodicote House**
Bodicote
Banbury
Oxon
OX15 4AA

Decision (including any steps ordered)

1. The complainant has requested information held by Cherwell District Council (the council) relating to a building control application for a particular housing development.

2. The Commissioner's decision is that regulation 5(3) of the EIR applies to certain parts of the request, as it is the complainant's own personal data.

3. With regard to the remaining parts of the request, the Commissioner is satisfied that, on the balance of probabilities, the council has provided the complainant with all the information that it holds.

4. However, as some of the information was only provided to the complainant after the intervention of the Commissioner, and not within the required 20 working days, the council has breached regulation 5(2) of the EIR.

5. The Commissioner does not require the council to take any steps as a result of this decision notice.

Request and response

6. On 27 August 2020, the complainant wrote to the council and requested information in the following terms:

I have previously written to Cherwell District Council's Building Control team twice (on 13th August and 19th August) regarding this request for information/documents but have had no success. Please see two attached email threads to confirm.

This request concerns Building Control application 13/00296/DOMFP2 - the Bicester Eco Town Exemplar Site on Banbury Road, Bicester (now known as Elmsbrook). Please could you provide copies of:

1. The plans for any building works related to [property 1] specifically and/or the 4 bedroom timber-clad & rendered properties on Phase 3 generally?

2. The details of the timber cladding installed in timber-clad & rendered properties on Phase 3, including any details about whether it is treated/untreated/coated, whether a breather membrane is present, and whether a ventilation gap is present.

3. The Cherwell District Council Building Control sign-offs at each stage for [property 1] specifically and explanation of what is checked at each stage.

4. The documentation required for issuing the final Building Control sign-off for [property 1].

5. The drawings provided by Crest Nicholson and/or Pinewood Installations (or equivalent) as Registered Competent Persons to demonstrate that the timber frame and external panel wall components they provide meet the following requirements of the Building Regulations:

1. The structural requirements as Approved Document A
2. Fire safety as Approved Document B
3. Resistance to sound as Approved Document E
4. Air leakage as Approved Document L
5. Thermal insulation as Approved Document L

6. The drawings from Crest Nicholson and/or the Registered Competent Person responsible for the Thermowood rain screen cladding affixed to [address 1] to demonstrate compliance with Building Regulations.

I confirm that the information requested is not already publicly available and other methods to obtain it have been tried without success. I would be grateful to receive the information by email at this address.

7. The council provided its response on 25 September 2020. It advised that the information requested was to be withheld under regulation 12(5)(f) of the EIR, because it had been provided to the council by the builder with the expectation that it would remain confidential.

8. Following an internal review, the council wrote to the complainant on 21 October 2020. It stated that, upon further consideration, it accepted that it had not been correct to apply regulation 12(5)(f) as the basis for refusing the request.

9. The council then informed the complainant that it was now refusing the request under regulation 13 of the EIR. It advised that it was reasonable to withhold all plans, drawings and any other third party decision/planning submissions on the basis that it was personal data and had been supplied by a third party for the purposes of completing a building control application. It went on to say that it did not regard it to be in the public interest to release the information, explaining the reasoning for this view.

10. The council did provide a link to information on its website that it believed to be relevant to part 2 of the complainant's request. It also provided the complainant with copies of some planning application drawings, stating that it believed it would have been helpful to have provided these with its initial response.

11. On 21 October 2020, the complainant contacted the council again, questioning the council's decision to apply regulation 13 to the withheld information. She also did not accept that information relevant to part 2 of her request was available on the council's website.

12. On 9 November 2020, the council responded to the complainant advising that it could not release the information requested under the EIR, or the Freedom of Information Act 2000 (FOIA), for the reasons it had already provided in its previous responses. It went on to say that it had considered whether the complainant was entitled to any information under the Data Protection Act 2018 (the DPA 2018), but was satisfied that the information requested was not her personal data.

Scope of the case

13. The complainant initially contacted the Commissioner on 9 November 2020, to complain about the way her request for information had been handled.

14. She was primarily concerned that she may not have received all the information held by the council that was relevant to her request.

15. Following the Commissioner's intervention, the council reviewed its position, and confirmed that it had decided to provide the complainant with the information requested *'as part of normal business'*, on the basis that she was the property owner. The council then provided copies of information to the complainant on 19 August 2021.

16. On 14 September 2021, the complainant contacted the Commissioner again to advise that she was unhappy with the council's revised response. She advised that she had still not received all the information that she had requested. She also raised concerns that some of the information provided was not actually what she had asked for, and that she had already advised the council that she did not require some of this information.

17. The Commissioner's analysis covers first whether the requested information is the personal data of the complainant.

18. If necessary, she will then go on to decide whether the council has complied with its statutory duties under the EIR. In particular, she will consider whether the council has provided the complainant with copies of all of the information she is entitled to receive under the EIR in response to her request.

Reasons for decision

Is the requested information the complainant's personal data?

19. Regulation 5(1) of the EIR states that a public authority that holds environmental information shall make it available upon request.

20. However, regulation 5(3) of the EIR states that, to the extent that the information requested includes personal data of which the applicant is the data subject, paragraph 5(1) shall not apply to that personal data.

21. Section 3(2) of the DPA 2018 defines personal data as:

    'Any information relating to an identified or identifiable living individual.'

22. The two main elements of personal data are that the information must relate to a living person, and that person must be identifiable.

23. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

24. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

25. The complainant has not raised any specific concerns about the council's response to part 1 of her request. As a result, the Commissioner will not give any further consideration to part 1 of the request within this decision notice.

26. Having considered the terms of the remaining parts of the request, and the information which has been made available to her from both parties, it is the Commissioner's opinion that parts 3, 4 and 6 of the request are for the personal data of the complainant.

27. The information within these parts of the request relate to a property that is owned by the complainant. The Commissioner is satisfied that the complainant can be linked to this property from other available information, such as the electoral register, land registry property ownership records, council tax records etc,.

28. Information which was not necessarily personal data when it was initially created, can later be defined as such, should it subsequently meet the definition of personal data quoted above.

29. The Commissioner accepts that the complainant was not the owner of property 1 at the time that the information which has been requested was created. However, once she took ownership of that property, there would be information held by the council about that property that is likely to then be considered to be her personal data, as the owner.

30. The Commissioner would take the view that decisions that have been reached about that property now have an impact on the complainant, as the property owner. For example, if details relating to the timber cladding which were held prior to, or at the time of the construction of property 1, were found not to meet the standards required, or indeed did meet the standards required, either way this has a direct impact on the complainant as the owner of the property; it tells us something about them and their home.

31. The Commissioner is therefore satisfied that parts 3, 4 and 6 of the request are for the personal data of the complainant. Regulation 5(3) therefore provides that the council was not required to disclose that information under the EIR. The council has already confirmed that it is to reconsider these parts of the request as a subject access request.

32. The Commissioner is satisfied that parts 2 and 5 are not the personal data of the complainant. She will therefore go on to consider whether the council has provided all the relevant information in response to these two parts of the request.

Regulation 5(1) - Duty to make environmental information available on request

33. Regulation 5(1) of the EIR states that *'a public authority that holds environmental information shall make it available on request.'* This is subject to any exceptions that may apply.

34. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the public authority to establish what information within the scope of the request it held, and any other reasons offered to explain why further information is not held. She will also consider any reason why it is inherently likely, or unlikely, that further information is not held.

35. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

36. The complainant advised the Commissioner that she believed that she had still not received any information in response to part 2 of the request, and only a partial response to part 5 of the request.

37. On 26 October 2021, the council provided a response to further enquiries made by the Commissioner in relation to part 2 and part 5 of the request.

38. It referred to documents contained within the bundle of information it had provided to the complainant on 19 August 2021. It also confirmed that, upon further review, some additional information had now been located which it was in a position to provide to the complainant. It apologised for not releasing this information previously, explaining that it had been a difficult task identifying all the relevant information within the extremely large volume of documentation held relating to the relevant housing development.

39. The council also confirmed that there was a cache of documents which were corrupted when some files were transferred between two databases. It confirmed that this information is not retrievable. Given this, unfortunately, the council cannot say with any certainty whether any of this information would have been relevant to the complainant's request.

40. The council went on to say that it was now of the opinion that it does not hold any information in addition to that which has now been provided to the complainant that is relevant to part 2 and part 5 of the request.

41. Whilst the Commissioner appreciates that the loss of a small amount of information following the corruption of some documents may be of disappointment to the complainant, based on the information provided by the council, she is satisfied that it is accurate to describe any recorded information within the corrupted documents as no longer held by the council.

42. It is the Commissioner's opinion that the council has now taken reasonable steps to search and identify the information held relevant to parts 2 and 5 of the request. Having considered the information available, she believes there to be no substantive evidence which would indicate that there is any additional information held that would be relevant to these two parts of the request.

43. The Commissioner understands that the council has also now provided the complainant with the additional information that it recently identified as being relevant to parts 2 and 5 of the request.

44. The Commissioner is therefore satisfied that, on the balance of probabilities, the council has now released all the information which it holds that is relevant to part 2 and part 5 of the request.

Procedural matters

45. Regulation 5(1) of the EIR provides a general right of access to recorded environmental information held by public authorities. Public authorities should make environmental information available within 20 working days or receipt of a request unless a valid exception applies in accordance with regulation 5(2).

46. Whilst the council has now provided the relevant information to the complainant, it failed to do so within the prescribed timescales. As a result, the Commissioner has found there to be a breach of regulation 5(2) of the EIR.

Right of appeal

47. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

    First-tier Tribunal (Information Rights)
    GRC & GRP Tribunals,
    PO Box 9300,
    LEICESTER,
    LE1 8DJ

    Tel: 0203 936 8963
    Fax: 0870 739 5836
    Email: grc@justice.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

48. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

49. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed .....

Ben Tomes
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF